

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1599 OF 2018**

M/s Subhlaxmi Metals and Tubes Pvt. Ltd. .. Petitioner

Versus

Shri Chatrapati Shahu Sahakari

Sahakar Karkhana Ltd. .. Respondent

Mr. Sean wassoodew for petitioner.

Mr. Amit Borkar for respondent.

CORAM : K.K. TATED, J.

DATE : 7 JANUARY 2019.

P.C:-

. Heard learned Counsel for the parties.

2. By this petition under Article 227 of the Constitution of India petitioner/original defendant is challenging the order dated 16.11.2017 passed by Civil Judge Senior Division, Kolhapur below Exhibit-34 in Special Civil Suit No.209 of 2013 rejecting petitioner's application for carrying out amendment in written statement for incorporating counter claim first time.

3. The learned Counsel for the petitioner submits that trial Court erred in coming to the conclusion that by carrying out

amendment in written statement, the defendant is placing counter claim on record. He further submits that trial Court came to the conclusion that at the time of filing written statement, defendant made all contentions in the written statement in respect of the counter claim and in spite of that rejected their application for amendment. He submits that trial Court also erred in coming to the conclusion that after trial begins, there is no question of allowing to carry out any amendment in written statement. In support of his contentions, he relies on following judgments :

- i) **Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Ors.¹**
- ii) **A.K. Gupta and Sons Ltd. Vs. Damodar Valley Corporation²**

4. On the basis of these submissions, learned Counsel for the petitioner submits that the impugned order passed by the trial Court is required to be set aside and allow the petitioner's application for carrying out amendment in written statement by placing on record counter claim.

5. On the other hand, learned Counsel Mr. Amit Borkar appearing on behalf of respondent/original defendant vehemently

1 AIR 1957 SC 363

2 AIR 1967 SC 96

opposed the present petition. He submits that in the present proceedings respondent/original plaintiff filed a suit for recovery of sum of Rs.30,35,989/- from petitioner/original defendant before the Civil Judge, Senior Division, Kolhapur in the month of October, 2013. Thereafter, petitioner/original defendant filed written statement on 23.04.2014. He submits that thereafter, the plaintiff filed their affidavit of evidence. Not only that, the plaintiff entered into Witness Box for cross examination. At this stage, original defendant filed application on 14.07.2017 for carrying out amendment in written statement and to put their counter claim on record. Therefore, the trial Court rightly rejected the petitioner's application for amendment on the ground that trial begins. In support of his contention, he relies on paragraph 10 of the impugned judgment. He further submits that even the Apex Court in the matter of **Ramesh Chand Ardawatiya Vs. Anil Panjwani**³ held that the question of allowing the parties to carry out amendment does not arise once the trial begins. In support of his contention he relies on paragraph 28, on the said authority which reads thus :

28. Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A

3 (2003) 7 SCC 350

would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be preferred by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter-claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no "previous pleading" on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the trial court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been

refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.”

On the basis of his submissions, the learned Counsel for the respondent/original plaintiff submits that there is no substance in the present writ petition and same is required to be dismissed with cost.

6. I have heard both the sides at length. It is to be noted that admittedly, in the present proceedings petitioner/original defendant filed application for carrying out amendment in the written statement for introducing the counter claim, when the plaintiff entered into witness box for cross examination. These facts are considered by the trial Court at the time of deciding said application.

7. The authorities relied upon by the petitioner are in respect of amendment of the plaint and written statement and not introducing the counter claim after the trial begins. Considering these facts authorities relied upon by the petitioner are not applicable in the facts of the present case.

8. Admittedly, once trial begins, in view of amended

provisions of CPC, there is no question of allowing the defendant to introduce the new facts that is counter claim in written statement. Even bare reading of the application below Exhibit-34 dated 14.07.2017 passed by petitioner original defendant for carrying out amendment in written statement and introducing counter claim shows that same was barred by limitation. Paragraph 17 of the application filed by the petitioner for incorporating counter claim in the written statement reads thus:

“17. The cause of action for filing this counter claim arose before filing w.s. and suit. It arose due to the defts letter dated 04.06.2012 and 27.11.2012 cancelling the purchase orders. The cause of action continued thereafter by the notice issued by the debt on 14.02.2013 u/s 164 of Maharashtra Co-op Societies Act, 1960. The counter claim is deemed to have been filed on 23.04.2014 (date of w.s.) and hence is well within limitation.”

9. Admittedly, in the present proceeding, respondent original plaintiff filed Special Civil Suit No.209 of 2013 before the 5th Joint Civil Judge, Senior Division, Kolhapur for recovery of sum of Rs.30,35,989/- in the month of October, 2013. In a copy of plaint, respondent stated that cause of action for filing a suit first time arises when advance amount of Rs.16,21,592/- paid to the petitioner original defendant by cheque dated 13.02.2012.

Paragraph 4 of the plaint reads thus:

“That the cause of action for suit arose first time on the abovementioned dates on which Plaintiff paid advance to defendant. Thereafter it arose on 04.06.2012, 27.11.2012, 12.12.2012, when Plaintiff by sending letters to defendant demanded the amount, it lastly arose when Plaintiff sent reply to the notice sent by Plaintiff through its advocate on 05.01.2013 and demanded the amount of advance but the defendant denied to refund the amount by sending reply to reply notice through its advocate on 04.02.2013.”

10. Bare reading of these facts shows that on the date of filing of application for carrying out amendment, counter claim was barred by limitation. That can be one of the ground to reject the petitioner's claim for carrying out amendment in written statement to incorporate the counter claim in the year 2017.

11. In view of these facts, I am of the opinion that petitioner has not made out any case to interfere in the order passed by the trial Court.

12. Hence, writ petition stands rejected.

(K.K.TATED, J.)